

# Competing Human Rights

OHRC Workshop for OCASI Conference  
November 3, 2015

# Purpose of the workshop

- Gain a better understanding of the concept of competing human rights
- Enhance ability to recognize situations where competing human rights issues might arise
- Explore an analytical model for resolving competing rights situations
- Have an opportunity to practise applying the model
- Be able to approach competing rights situations at work with more confidence and clarity, as well as awareness of resources available to help

# The Ontario *Human Rights Code*

- The *Code* is the law in Ontario prohibiting **discrimination** and **harassment**
- Promotes a climate of understanding and mutual respect for the dignity and worth of each person
- Provides for equal rights and opportunities without discrimination
- Aims to ensure each person feels a part of the community and able to contribute fully

# Social areas

- Code prohibits discrimination and harassment in 5 areas of life, called “social areas”:
  - Employment
  - Services, goods & facilities
  - Housing
  - Contracts
  - Membership in vocational and professional associations

# The prohibited grounds

- *Code* prohibits discrimination on the basis of certain “grounds”:
  - Race
  - Ancestry
  - Place of origin
  - Colour
  - Ethnic origin
  - Citizenship
  - Creed
  - Sex (includes pregnancy)
  - Sexual orientation
  - Gender identity
  - Gender expression
  - Age
  - Record of offences (employment only)
  - Marital status
  - Family status
  - Disability (incl. mental & perceived disabilities)
  - Receipt of public assistance (housing only)

# Intersectionality

- Where *Code* grounds intersect, it creates new and unique contexts for discrimination - e.g., young Black men; women who have immigrated to Canada
- Important in detecting and appreciating the full impact of discrimination

# Discrimination

- “Discrimination” is not defined in the *Code*
- Case law definition: **Adverse treatment or impact in a social area based on a *Code* ground**
- For example, discrimination could result in exclusion from services or employment, imposition of extra burdens not imposed on others, or benefits withheld due to a *Code* ground
- Often confirmed where adverse treatment or impact is:
  - associated with a stereotype
  - offensive to human dignity
  - targeting a historically disadvantaged community
  - shown relative to others

# Intent not required



INTENT

Intent is NOT a prerequisite for a finding of discrimination.

Lack of intent is NOT a defense

Consider the **CONSEQUENCE or IMPACT** of the action(s)



# Key concepts

- Primacy of the *Code*
- Remedial nature of the *Code*
- Substantive equality
  - Equal outcomes and benefits, not just same treatment
- Standard of proof: balance of probabilities

# Some forms of discrimination

- Direct discrimination
- Indirect discrimination (i.e., through a third party)
- Harassment – a vexatious course of comment or conduct that is known or ought to be known to be unwelcome
  - Can relate to any *Code* ground
  - *E.g.*, slurs, jokes, email messages, insults
- Poisoned environment – actions or words that poison the environment for others
  - *E.g.*, a racial slur used in a workplace may be so serious that it poisons environment for all racialized people

# Some forms of discrimination

- Adverse impact discrimination
  - Rules, policies, procedures, requirements, qualifications or other factors that may not be directly or intentionally discriminatory but that have an adverse effect, and cannot be justified under the *Code* as “bona fide requirements”
    - E.g., many job requirements for Canadian experience create an adverse impact for people whose place of origin is outside Canada

# “Bona fide” requirements

- A rule, requirement *etc.* that has an adverse effect on a *Code*-protected group is permitted where it can be shown to be reasonable and *bona fide* (legitimate) in the circumstances
- Organization must show that the rule, requirement or standard is:
  - adopted for a purpose rationally connected to the function (e.g. the performance of a job);
  - adopted in good faith;
  - reasonably necessary, in the sense that it is impossible to accommodate the person or group without undue hardship

# Duty to accommodate

- Accommodation is a process of looking for alternatives to existing policies, practices, requirements, facilities, etc., in order to enable a person to participate and benefit equally from whatever an organization is offering
- 3 principles:
  - Dignity
  - Individualization
  - Integration & full participation
- Employers and service providers must accommodate unless it would cause undue hardship based on cost or health and safety

# Competing human rights

- Where two legally protected rights come into direct and substantial conflict with each other, and at least one relates to *Code* human rights
- Human rights are inherently limited by other legal rights – for example:
  - *Code* right v. another *Code* right
  - *Code* right v. *Charter* right
- Human rights are granted special protection
  - Other rights may be protected by legislation but don't have special status given to human rights
  - Claims may also be based on interests or values, but generally they do not have legal protection
- Competing rights often involve grounds of disability, creed & sexual orientation, but may involve any grounds

# OHRC Policy on Competing Human Rights

- Policy is intended to be a tool for organizations
- Sets out a process for dealing with competing rights that emphasizes specific objectives:
  - Show dignity, respect for one another
  - Encourage mutual recognition of interests, rights/obligations
  - Facilitate maximum recognition of rights
  - Help parties to understand scope of rights/obligations
  - Address stigma, power imbalances; help give marginalized individuals and groups a voice
  - Encourage cooperation, shared responsibility for finding agreeable solutions that maximize enjoyment of rights

# Practical steps to reduce potential for conflict

- Organizations covered by the *Code* have a legal duty to address competing rights issues
- Organizations can reduce the potential for competing rights conflict by:
  - Knowing their obligations under the *Code*
  - Conducting education and training
  - Having an effective competing rights policy in place (including, for example, a commitment to addressing issues promptly)



# Key legal principles

- No rights are absolute
- There is no hierarchy of rights
- Rights may not extend as far as claimed
- The full context, facts and constitutional values at stake must be considered
- Must look at extent of interference (only actual burdens on rights trigger conflicts)

# Key legal principles

- The core of a right is more protected than its periphery
- Aim to respect the importance of both sets of rights
- Statutory defences (e.g., rights of religious officials to refuse to solemnize marriages) may restrict rights of one group and give rights to another

Organizations **must** consider these legal principles when they deal with competing rights situations

# Analysis for addressing competing rights situations

## Stage One | Recognizing Competing Rights Claims

**Step 1: What are the claims about?**

**Step 2: Do claims connect to legitimate rights?**

- (a) Do claims involve individuals or groups rather than operational interests?
- (b) Do claims connect to human rights, other legal entitlements or *bona fide* reasonable interests?
- (c) Do claims fall within the scope of the right when defined in context?

**Step 3: Do claims amount to more than minimal interference with rights?**

# Analysis for addressing competing rights situations

## Stage Two | Reconciling Competing Rights Claims

**Step 4: Is there a solution that allows enjoyment of each right?**

**Step 5: If not, is there a “next best” solution?**

# Analysis for addressing competing rights situations

## Stage Three | Making Decisions

- Decisions must have regard for OHRC policy and be consistent with:
  - human rights and other law,
  - court decisions, and
  - human rights principles

# Organizational role

## The Organization:

- Is usually not a claimant
- But it has corporate liability to uphold the *Code* and address human rights claims with due process
- It also has regard for other *bona fide* and relevant organizational interests and concerns
- Where competing rights scenarios emerge, it has a responsibility to consider all factors and arrive at a decision that respects human rights

# Process for addressing competing rights

- Many competing rights situations can be resolved quickly and informally
- If a quick, informal process between the parties doesn't resolve the issue, organizations may use a full, more formal process:
  - Policy proposes **ADR model**

# Case study #1

- A gay male high school student is denied the opportunity to attend the senior prom in his Catholic high school



ANALYSIS	MATT'S CLAIM	SCHOOL BOARD'S CLAIM
	<b>Recognizing rights</b>	
<b>1. Understand each claim</b>	<p>Matt is a gay 17-year-old student attending a publicly funded Catholic high school. He wishes to bring his boyfriend to the prom, which is being held off school property. The school said no.</p> <p>Matt believes that this is a violation of his human rights. He is considering seeking a court injunction because the prom is only weeks away.</p>	<p>The school principal and the School Board have said no on the grounds that this would be endorsing conduct contrary to the Catholic Church's teachings.</p>

ANALYSIS	MATT'S CLAIM	SCHOOL BOARD'S CLAIM
	Recognizing rights	
2. Connect claims to rights:		
a. Is it about individuals and groups rather than simply operational interests? Which individuals' or groups' rights or core interests may be affected?	<p>Matt and his boyfriend who attends another school</p> <p>His friends who are bringing their opposite sex dates</p> <p>Other LGBTQ students who may want to bring dates</p> <p>Supportive staff and parents sharing in the celebration</p> <p>Broader LGBTQ community with similar past experience</p>	<p>Principal who interprets job duty to instil religion to cover extra curricular</p> <p>Board members with responsibility to uphold policies</p> <p>Church's role as spiritual guide school/board policy and practice</p> <p>Other students, staff and parents wanting to uphold religion</p> <p>Other schools facing similar situations</p>

ANALYSIS	MATT'S CLAIM	SCHOOL BOARD'S CLAIM
	<b>Recognizing rights</b>	
<b>2. Connect claims to rights:</b>		
b. Human rights, other legal entitlements, bona fide and reasonable interests	<p>Code s.1 services discrimination, poisoned environment</p> <p>Charter s.15(1) equality rights</p> <p>Charter s.2(b) freedom of expression</p> <p>Charter s.2(d) freedom of association</p> <p>Charter s.1 reasonable limits</p> <p>Education Act right to &amp; requirement for education</p> <p>UN CESCR art.2 &amp; 13 right to educ. w/o discrimination</p> <p>Extra-curricular/social BFR benefit of school life</p>	<p>Code s.19 / Charter s.29 / Const. Act s.93 preserves Catholic school rights</p> <p>Charter s.2(a) &amp; UN CCPR art.18.1 freedom of conscience and religion</p>

ANALYSIS	MATT'S CLAIM	SCHOOL BOARD'S CLAIM
	Recognizing rights	
2. Connect claims to rights:		
c. Does claim fall within scope of right in this context?	<p>Extracurricular/social activities held off school premises are not at the core of teaching</p> <p>Prom is not a religious event, is not educational in nature, and is held off of school property</p> <p>Diversity and inconsistency of Catholic opinion and practice: school accepts gay students but wishes to suppress all activity connected with their sexuality</p>	<p>Catholic school rights include full board discretion over religious matters</p> <p>All school sanctioned activities, on or off-site, must promote and uphold religious teachings</p> <p>School board practice is consistent with policy even if diversity of Catholic practice exists</p>

ANALYSIS	MATT'S CLAIM	SCHOOL BOARD'S CLAIM
	<b>Recognizing rights</b>	
<p><b>3. Interference more than minimal?</b></p>	<p>Unlike other students, Matt is not free to choose his date for school social functions; would have to go alone</p> <p>Substantially interferes with nature of prom: bringing a date and dancing with partner of choice</p> <p>Would miss out on end of year/graduation "rite of passage"</p> <p>Different treatment based on sexual orientation a serious injury of dignity</p>	<p>Allowing same sex date at extra curricular/social would impede ability to promote religious school environment and teach religious curriculum consistent with tenets of faith within core hours</p> <p>Would have broad impact on other Catholic schools and Church</p>

ANALYSIS	MATT'S CLAIM	SCHOOL BOARD'S CLAIM
	<b>Reconciling rights</b>	
<b>4. Search for solutions ideal to both sides</b>	<p>OPTION 1</p> <p>Also prohibit non-LGBTQ students from bringing “dates”</p> <p>Allow any student to bring a “guest”</p> <p>Require all students to refrain from intimate behaviour</p> <p>Neutral terminology and inclusive policy approach to avoid further stigmatizing LGBTQ students</p> <p>School would otherwise limit upholding formal Catholic board policy and Church position on religious tenets to educational settings and core hours</p> <p>Board could maintain “don’t ask don’t tell” guest policy to not prejudice Catholic school rights</p> <p>OPTION 2</p> <p>Change school/board policy to no longer sanction/organize/fund proms as official school events</p> <p>Would be entirely a student-initiated responsibility held offsite without formal connection to the Catholic school</p>	

ANALYSIS	MATT'S CLAIM	SCHOOL BOARD'S CLAIM
	<b>Reconciling rights</b>	
<b>5. Fall back on next best options?</b>	Allow Matt to attend with a “guest” of his choice while allowing other students to attend with their formal opposite sex “date”	<p>Comply with any court injunction allowing Matt to attend with boyfriend this time only</p> <p>Take position that any injunction does not prejudice Catholic school rights</p> <p>Examine Church doctrine more closely against school/ board policy whether proms are at core or periphery of Catholic school rights</p>

ANALYSIS	MATT'S CLAIM	SCHOOL BOARD'S CLAIM
<b>Duty to address rights: follow laws, courts, principles, OHRC policy</b>	<b>Making decisions</b>	
	<p>Hall v. Powers, Ont. Superior Court 2002 (injunction order allowed Hall to attend prom with same-sex date)</p> <p>Smith v. Knights of Columbus, BCHRT 2005 (re: scope of organizational obligations on versus off premises)</p>	<p>Hall v. Powers, Ont. Superior Court 2002 (did not rule on Catholic school rights)</p> <p>Ross v. New Brunswick School District No. 15, SCC 1996 (re: poisoned environment)</p>



# Hall (Litigation Guardian of) v. Powers

## Ontario Supreme Court Decision

- Granted injunction
- Exclusion of a student from a significant occasion of school life, like the school prom, constitutes a restriction in access to a fundamental social institution
- Prom has courtship and celebratory aspects
- Prom is not part of a religious service or religious education, not held on school property and not educational in nature
- Found denominational school rights not prejudicially affected

# Another case law example

ANALYSIS	TEACHERS' COLLEGE	GOVERNING BODY
	<b>Recognizing rights</b>	
<b>1. Understand each claim</b>	<p>A private Christian teachers' college claims the provincial governing body is discriminating based on religion by refusing to certify the college's program because of the college's admissions policy prohibiting homosexual behaviour for its student teachers. This would discourage those wishing to pursue teacher training in a religious institution denying them certification and the opportunity to work in the public school system.</p>	<p>The governing body claims the college's prohibition on homosexual behaviour is discriminatory based on sexual orientation. Approving their teaching program would be contrary to the public interest because these teacher graduates may exhibit bias, prejudice and intolerance towards LGBTQ students or their LGBTQ parents and be seen to poison the learning environment in the public school system.</p>

# Trinity Western v. B.C. College of Teachers

## Supreme Court Decision

- Affirmed right to hold religious beliefs, even those seen as intolerant of others
- Rejected argument teachers would discriminate against LGBTQ students because their Christian college had required they agree to community standards prohibiting “homosexual activity”
- No concrete evidence that holding beliefs about “homosexuality” would result in discriminatory actions

# Other case studies

- Prepared case studies
  - Allergies and service animals
  - Terminal Barber Shop
- Examples raised by participants?
- Goal of case studies and examples is to explore the issues and the analytical framework, NOT to come up with the “right answer”

Final questions or comments?